IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1970

BOARD OF REGENTS OF THE UNIVERSITY
OF TEXAS SYSTEM,

Appellant

v.

NEW LEFT EDUCATION PROJECT, et al.,

Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS, AUSTIN DIVISION

MOTION TO DISMISS AND/OR AFFIRM

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Appellees in the above entitled case move to dismiss and/or affirm on the alternative grounds that this Court lacks jurisdiction inasmuch as this matter did not require the convening of a three-judge court under 28 U.S.C. Sec. 2281, or if this Court has jurisdiction the decision below should be affirmed because the question presented is so unsubstantial as not to need further argument.

STATEMENT OF THE CASE

The Young Democratic Club of the University of Texas, The Young Socialist Alliance, and certain individual students at the University of Texas at Austin have obtained declaratory and injunctive relief against the University of Texas Board of Regents. The judgment prohibits the Defendants from enforcing, as against the Plaintiffs, Section 6.11 and 6.12 of the Regents Rules and Regulations. The three-judge court below found these rules, which purport to limit commercial and non-commercial solicitation on the University of Texas campus, to be "unconstitutionally overbroad" and "unreasonably restrictive of the clearly protected activities engaged in by the Plaintiffs." (Jurisdictional Statement, p. 23).

The trial court's conclusion is founded on a record which discloses that the Regents, under the guise of regulation of commercial and non-commercial solicitation, substantially restricted the legitimate political activity of the Plaintiffs, while permitting comparable activity by non-political organizations. The University rules, for example, permitted on campus, "a balloon sale . . . to draw attention to the unfortunate circumstances of the poor people in East Austin" and other solicitation of funds for the "needy or suffering" (Price Affidavit), while denying The Young Democrats and The Young Socialists the right to solicit membership dues (Stipulation). The same rules permitted the Student Association to sell "life and hospitalization insurance" and the Acappella Choir to sell "stickers, records," etc. (Defendants' Answers to Interrogatories), while prohibiting The Young Democrats from selling political bumper stickers and The Young Socialists from selling their publication "The Militant" (Dolfi and Kincaid Affidavits).

In light of the undisputed evidence of unreasonable restraints upon the First Amendment rights of the Plaintiffs, the Court granted Plaintiffs' prayer for declaratory relief and enjoined the Defendants "from further enforcement against the Plaintiffs of

Articles 6.11 and 6.12 of the Rules and Regulations of the Board of Regents of the University of Texas system" (Judgment).

THE COURT LACKS JURISDICTION OF THIS APPEAL

A three-judge court was convened at the behest of the Defendants, and not at the request of the Plaintiffs. It continues to be the view of the Plaintiffs that the injunction against the enforcement of a rule of the Board of Regents does not require the convening of a three-judge court under Section 2281 of Title 28. While we recognize that the rules in question apply to various institutions under the Regent's jurisdiction, there are many state-supported colleges and universities in Texas which are not governed by the defendant's rules. The rules clearly are not of "general and statewide application" as contemplated by Section 2281, *Moody v. Flowers*, 387 U. S. 97, 101 (1967). It has been a consistent view that "congressional enactments providing for the convening of three-judge courts must be strictly construed," *Allen v. State Board of Elections*, 393 U. S. 544, 561 (1969). Surely a three-judge court was not here required if the purpose of 2281 is to "prevent a single federal judge from being able to paralyze totally the operation of an entire regulatory scheme . . . by issuance of a broad injunctive order," *Kennedy v. Mendoza-Martinez*, 372 U. S. 144, 154 (1963); *Moody v. Flowers*, 387 U. S. 97, 101 (1967).

THERE IS NO BASIS FOR THE CLAIM OF RES JUDICATA

The assertion of res judicata is founded upon the grant by a state court of temporary injunction against the distribution on the University of Texas campus of an underground newspaper known as "The Rag." None of the parties plaintiff in the federal proceeding were named as parties in the state court action, nor

were they persons otherwise associated in the distribution of "The Rag."[1]

The claim of res judicata founders at the outset because under Texas law the grant of a temporary injunction is an interlocutory order which will not support a claim of res judicata. Thus the Texas Supreme Court in *Miers v. Brouse*, 271 S. W. 2d 419, 421 (1954) held:

> "That the order granting the temporary injunction could not be the basis of res adjudicata since it is only an interlocutory order . . ."

No one suggests that the force of the *Miers* case has been impaired by any later decisions of the Texas Supreme Court.

Even if a temporary injunction would sustain a plea of res judicata, it would not affect the plaintiffs in this case who were never parties to the state court proceeding and who, although they might have enjoyed similar concern about the impact of the Regents' rules, did not share the requisite common interest with the state court litigants. As the Supreme Court recognized in *Hansberry v. Lee*, 311 U. S. 32, 44 (1940):

> "It is one thing to say that some members of a class may represent other members in a litigation where the sole and common interest of the class in the litigation, is either to assert a common right or to challenge an asserted obligation . . . It is quite another to hold that all those who are free alternatively either to assert rights or to challenge them are of a single class, so that any group merely because it is of the class so constituted, may be deemed adequately to represent any others of the class in litigating, their interest in either alternative. Such a selection of representatives for purposes of litigation, whose substantial interests are not necessarily or even probably the same as those whom they are deemed to represent, does not afford that protection to absent parties which due process requires."

[1] Although at one point the Defendants in the state court "Rag" litigation had been parties plaintiff in the federal proceeding, the federal court dismissed them as parties plaintiff because of the pendency of the state court action, retaining jurisdiction to deal with the issues presented by the other plaintiffs who were not parties to the state court action.

Finally, this Court's decision in *England v. Louisiana State Board of Medical Examiners,* 375 U. S. 411 (1964), does not seem at all in point, for there is no suggestion that the plaintiffs in the federal court ever litigated in the state court and hence could hardly make the "reservation" of the right to return to the federal tribunal.

THE REGENTS' RULES UNDER ATTACK WERE PROPERLY FOUND UNCONSTITUTIONAL

Appellant fails to offer reasonable support for its rules. The rules did not distinguish, as Appellant suggests, between *action* and *expression.* Publications of all kinds could be freely distributed on the campus; they could not, however, be sold without University sanction. The rules made no distinction as to time, place or manner of distribution, rather the rules banned the sale of political literature on campus on the sole basis that such activity was "commercial" in nature. "[T]o sanction considerations of this fact might indeed induce self-censorship, and offend the frequently stated principle that commercial activity, in itself, is no justification for narrowing the protection of expression secured by the First Amendment." *Ginzburg v. United States,* 383 U. S. 463, 474 (1966).

CONCLUSION

We respectfully submit that this appeal should be dismissed for lack of jurisdiction, or in the alternative that the judgment below should be affirmed.

Respectfully submitted,

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